

General Information Letter: In order for compensation of a nonresident to be paid in this State, some services must be performed in this State.

March 24, 1999

Dear:

This is in response to your letter dated March 17, 1999, in which you request a letter ruling. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter you have stated the following:

I am a consultant currently employed by a company operating out of xxxxxxxxxxxx, IL. Most of my assignments are located away from my home residence of xxxxx, TX. My company currently withholds Illinois state income tax when I am home in xxxxx and not working for a client. I would like a private letter ruling indicating whether or not I have any responsibility to pay Illinois state income tax, when I am not engaged in work in the state of Illinois (considering that I am a resident of the state of Texas).

I do not necessarily mind the fact that my company is withholding Illinois state income tax. However, if it is true that I do not have a responsibility for the paying the tax then I would like to be able to file to get it back.

Response

Section 302(a) of the Illinois Income Tax Act (35 ILCS 5/101 et seq.) provides the rule for determining whether a nonresident employee is subject to Illinois income tax on his or her wages or salary, as follows:

All items of compensation paid in this State (as determined under Section 304(a)(2)(B)) to an individual who is a nonresident at the time of such payment and all items of deduction directly allocable thereto, shall be allocated to this State.

In this provision, "compensation" means wages or salary paid to an employee for personal services. See Section 1501(a)(3) of the Illinois Income Tax Act. If compensation is not allocated to Illinois under this provision, a nonresident is not subject to Illinois income tax on that compensation. See Section 301(c)(1) of the Illinois Income Tax Act.

Section 701(a) of the Illinois Income Tax Act provides:

Every employer maintaining an office or transacting business within this State and required under the provisions of the Internal Revenue Code to withhold a tax on:

(1) compensation paid in this State (as determined under Section 304 (a) (2) (B)) to an individual . . .

Section 304(a)(2)(B) of the Illinois Income Tax Act provides:

Compensation is paid in this State if:

(i) The individual's service is performed entirely within this State;

(ii) The individual's service is performed both within and without this State, but the service performed without this State is incidental to the individual's service performed within this State; or

(iii) Some of the service is performed within this State and either the base of operations, or if there is no base of operations, the place from which the service is directed or controlled is within this State, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

Under these provisions, compensation paid to a nonresident cannot be "paid in this State" unless at least some of the nonresident's services are performed within Illinois. Your letter does not rule out the possibility that some of your services are performed within Illinois. Accordingly, we cannot issue a private letter ruling in response to your current letter stating that you are not subject to Illinois income tax on your compensation or that no withholding is required.

Even if some (but not all) of your services are performed in Illinois, it is possible that your compensation will not be "paid in this State" because the services performed in Illinois are incidental to the services provided outside the State or because your "base of operations" is outside the State or the place from which your services are controlled is outside the State. Again, however, your letter does not contain sufficient information for us to issue a private letter ruling on this subject.

Please note that, if Illinois income tax has been improperly withheld and paid over to the State on your compensation, the only way you can get a refund is to file an Illinois income tax return showing that you have no income allocable to this state and claiming a refund of the taxes withheld. If income tax was properly withheld, you have a legal obligation to file an Illinois income tax return. Accordingly, regardless of whether or not Illinois income tax was properly withheld and whether or not you receive a favorable ruling, you should file an Illinois income tax return for any year in which Illinois income taxes were withheld from your compensation.

As stated above, this is a general information letter which does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b). If you have any questions about obtaining a private letter ruling, please do not hesitate to contact me.

Sincerely,

Paul S. Caselton
Associate Chief Counsel -- Income Tax